Vejseli, M. (2023). Anticompetitive price fixing in distribution agreements – ecj c-211/22, super bock v. Portuguese competition authority, *SCIENCE International journal, 2*(3), 147-150.
doi: 10.35120/sciencej0203147v UDK: 338.516.45:341.63]:339.137.2:340.13(469)

ANTICOMPETITIVE PRICE FIXING IN DISTRIBUTION AGREEMENTS – ECJ C-211/22, SUPER BOCK V. PORTUGUESE COMPETITION AUTHORITY

Marta Vejseli[1*]

[1]International Balkan University, North Macedonia
e-mail: martavejseli@gmail.com

Abstract: On June 29, 2023, the judgment concerning the case C-211/22, Super Bock v. Portuguese Competition Authority, was released by the European Court of Justice ("ECJ"). This judgment delivers a comprehensive review of fundamental competition law principles pertaining to vertical agreements.

In this judgement was examined the business approach of Super Bock, a manufacturing Portuguese company. The preliminary ruling emphasizes to the court referring the case the vital distinction between hardcore restrictions as defined by the Vertical Block Exemption Regulation (VBER) and competition-constraining practices falling within the purview of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

Furthermore, the ruling clarifies the expansive scope of the term "agreement" according to Article 101(1) of the TFEU, while also highlighting the array of (both direct and indirect) evidence that can substantiate the identification of an agreement. In alignment with established legal precedents, ECJ reinforces the principle that an agreement encompassing nearly the entire geographical expanse, though not entirely exhaustive, of a Member State can still impact the inter-member trade.

Vertical agreements involve relationships between entities at various levels of the supply chain, such as manufacturers and distributors. The key aspects addressed in this judgment have direct relevance to how manufacturers interact with their distribution networks and set pricing policies, which in turn can affect market dynamics and competition within the manufacturing industry.

The Super Bock v. Portuguese Competition Authority judgment serves as a pivotal milestone in clarifying the legal framework governing vertical agreements in the European Union. Its comprehensive analysis of competition law principles provides valuable guidance to businesses operating within the EU, ensuring a more transparent and predictable regulatory environment for vertical agreements and, consequently, fostering healthy competition in the market. The ECJ confirmed for the first time the established EU law principles regarding vertical price-fixing agreements. It emphasizes that an agreement should not rigidly be classified by actions without considering the broader context. Although deviating from stricter framework centered on the primary purpose and severe restrictions may complicate the application of the law, this ruling encourages a more thoughtful evaluation of vertical agreements and their overlap with competition law.

Keywords: vertical agreements, resale price maintenance, Art 101 TFEU, price fixing, competition law.
Field: Social sciences

1. INTRODUCTION

The situation in question involves a Portuguese beer company called Super Bock and its sales of beverages in Portugal. Super Bock made agreements with independent distributors for distributing its beverages in almost all territory of Portugal, by granting them exclusivity for the sale of its products in specific areas like hotels, restaurants, bars, and cafés.

For over a decade, Super Bock consistently set the rules for how its distributors should do business with Super Bock's beverages: The distributors were supposed to set minimum prices to make sure the prices stayed relatively stable across Portugal. The distributors had to share sales information with Super Bock, like quantities and prices, and Super Bock would take action against those who sold for less than the set prices or didn't follow the rules.

Because of these actions, the Portuguese Competition Authority (hereinafter: "authority") started an investigation. The authority found that Super Bock's actions went against Article 101 TFEU that prevents anticompetitive agreements. As a result, the authority fined both Super Bock and two of its representatives (directors). The case was taken to the Portuguese Competition Court, which agreed with the authority's decision. When Super Bock appealed to the Tribunal da Relação de Lisboa (Court of Appeal, Lisbon, Portugal), the proceedings were paused, and the case was referred to the Court of Justice in Luxembourg.

*Corresponding author: martavejseli@gmail.com

In its request to the Court of Justice, the Court of Appeal asked for clarification about how to interpret Art. 101 TFEU and, specifically, whether an agreement that sets minimum resale prices can be seen as automatically harming competition, without looking at the bigger context of the agreement. The Court of Appeal questioned further how the concept of "agreement" should be interpreted where minimum resale prices are imposed by the supplier on its distributors. Thirdly, it asked whether the concept of „effect on trade between Member States" can be harmful to competition if the distribution agreement affects almost the entire territory of just one Member State (para 18, ECJ C-211/22, Super Bock v. Portuguese Competition Authority, 29 June 2023). So, the Court of Justice had to answer these three questions raised by the Portuguese court.

2. RESALE PRICE FIXING AGREEMENTS AND EU COMPETITION LAW

2.1. Resale Price Maintenance and Restriction of Competition by "Object"

"Resale price maintenance" refers to the situation wherein a supplier enforces constraints on the pricing by a buyer at the time of the resale of goods or services that have been provided by the supplier. In simpler terms, this refers to a vertical agreement that involves setting minimum resale prices. Through minimum price or fixed price agreements, suppliers instruct buyers not to go below a certain price level or to steadfastly maintain a specific price when reselling the goods or services (para 186, Communication from the Commission, 2022).

Article 101 of the TFEU prevents agreements, whether they are between competitors (horizontal) or between different levels of the supply chain (vertical), from intentionally or unintentionally harming competition. Parties involved in an illegal agreement must demonstrate efficiencies as outlined in Article 101(3) of the TFEU in order to be excused from the prohibition laid out in Article 101 TFEU. This necessitates a profound assessment. Another approach for a vertical agreement to receive an exemption is to meet the criteria of one of the European Commission's block exemptions.

However, it's important to note that certain practices, which are generally recognized as restrictions on competition by their nature, are labeled as "hardcore" restraints in the Commission's notices, guidelines, and block exemptions.

One of them is the resale price maintenance. The resale price maintenance is being seen as harmful for competition, namely as a "hard-core restriction," and this is stated in Article 4 a) of Regulation (EU) 2022/720 (hereinafter: "VBER"), further in Section 6.1.1. of the Communication on Vertical Restraints (2002) (Communication from the Commission, Commission Notice, Guidelines on Vertical Restraints (2022/C 248/01) and is being seen as a restriction "by object" under Article 101(1) of the Treaty.

These restraints are so far automatically assumed to violate Article 101(1) TFEU and are presumed to not fulfill the criteria specified in Article 101(3) TFEU. Once it is confirmed that a specific agreement contains such a hardcore restriction, the agreement automatically becomes ineligible to benefit from any of the Commission's block exemption regulations. The size of the market shares held by the participating companies is inconsequential when applying the antitrust prohibition to price fixing (ECJ, Judgment of December 13, 2012, Case C-226/11, para. 37 – Expedia). Given this context, the resale price maintenance is a restriction of competition "by object" according to Art. 101(1) TFEU and can only be justified in exceptional cases according to Art. 101(3) TFEU.

2.2. Any difference between hardcore restriction and by object?

The novelty in this judgment is that the ECJ declares that the concept of "restriction of competition by object" must be interpreted restrictively: it declared that if a restriction qualified as a "hard-core restriction" under the VBER, it does not necessarily mean that the restriction is automatically a restriction "by object" according to Art. 101(1) TFEU. Against this background, the concepts of "hardcore restrictions" and of "restriction by object" are not conceptually interchangeable and do not necessarily overlap (para 44). Instead, the responsibility lies with the parties to evaluate the agreement and determine whether it resulted in any improvements that could warrant an exemption. Thus, a national court or competition authority can find that a vertical agreement fixing minimum resale prices entails a "restriction by object" only after having determined that the actual agreement "presents a sufficient degree of harm to competition" (para 43). In conducting this analysis, it is essential to consider the agreement's terms, its intended objectives, and all the elements that characterize the economic and legal context in which it is situated. The ECJ reached this conclusion, thereby leaving it to the referring Portuguese court to make such an assessment (para 43).

2.3. Meaning of "Agreement" according to art. 101 TFEU

In its second question, the Portuguese court asked for guidance regarding the concept of "agreement" as outlined in Article 101 TFEU. This clarification was sought to determine whether, within the context of the ongoing case, there is indeed a formal agreement in place between Super Bock and its distributors (para 44). Basically, the referring court seeks explanation regarding the concept of "agreement" to be able to determine whether there is an agreement between Super Bock and its distributors (para 45).

Considering case-law, an agreement refers to any expression of a shared intention to behave in a specific manner in the market (European Court of Justice (ECJ), July 15, 1970, Case C-261/70, para. 112 – ACF, and the decision of October 29, 1980, combined Cases C-125/80, para. 86 – van Landewyck, as well as considering the German Federal Court of Justice (BGH) resolutions, including the ruling of February 15, 1962, Case KRB 3/61 – Putzarbeiten II, and the judgment of April 22, 1980, Case KZR 4/79 - Taxi Owners Association). Such an expression of intent to bind the purchaser's prices doesn't necessarily have to be explicit but can be inferred from the circumstances. The agreement doesn't need even to be binding or legally enforceable. Conversely, purely unilateral actions without a recognizable expression of shared intent do not violate antitrust laws. However, under certain circumstances, even unilateral requests for price binding could be prohibited under German law (German Competition Authority, July 2017, Guidelines on Price Fixing Prohibition in the Field of Food Retail).

The ECJ confirmed by this judgment the established case law stating that an agreement requires the mutual consent of both parties (Court of 18 November 2021 in Case C-306/20, Visma Enterprise, para. 94). More specifically, in order to assume a vertical price-fixing agreement, "it is necessary to establish whether the distributors have either implicitly or explicitly agreed to comply with the supplier's request to maintain resale prices" (Jacques Buhart, Stéphane Dionnet, Frédéric Pradelles, Vertical agreements & restriction of competition by object: What's new in Europe? July 11, 2023). It should be noted that Article 4, paragraph a) of the Vertical Block Exemption Regulation assumes that any limitation on the ability of the buyer to independently determine their selling price constitutes a significant restriction on competition (Bauer / Rahlmeyer / Schöner, Vertriebskartellrecht, 2020, § 9 Preisbindungen, para 12).

While unilateral actions themselves may not inherently qualify as agreements which restrict competition "by object", if a supplier provides distributors with minimum price lists, either verbally or in writing, and requests that they adhere to these prices, and then actively monitors and enforces this pricing strategy with the threat of punitive actions, the distributors' acceptance and compliance with these suggested prices without objection could suggest an implicit agreement or acceptance of the supplier's practice.

However, the final assessment of this question lies with the referring court, who will have to make a final assessment on the facts in a subsequent judgement at national level (para 51).

2.4. The effect on trade between member states

Lastly, the Portuguese court asked by its sixth question, "… whether Article 101(1) TFEU must be interpreted as meaning that the fact that a vertical agreement fixing minimum resale prices covers almost the entirety, but not all, of the territory of a Member State prevents that agreement from being able to affect trade between Member States" (para 59).

In this point, the ECJ did not diverge from its established case law. The ECJ stated in this point that trade impact between Member States typically arises from a combination of various factors, none of which may individually determine the outcome. To determine if an arrangement significantly affects trade between Member States, it's essential to analyze it within its economic and legal framework (see judgment of 11 July 2013, Ziegler v Commission, C 439/11 P, EU:C:2013:513, para 93). So, it's crucial to determine, with a reasonable level of certainty, whether the agreement has a notable "direct or indirect, current or potential impact" on trade between Member States, even if it only applies to a portion of a Member State's territory. The ECJ has held "that an arrangement that covers even only part of the territory of a Member State may, in some circumstances, be capable of affecting trade between Member States" (Judgment of the Court of 3 December 1987 in Case 136/86, BNIC v Aubert, para 18.).

Hence, the ECJ responded to the sixth question that a vertical agreement establishing minimum resale prices, which applies to nearly the entire but not the whole territory of a Member State, can still affect trade between Member States (para 65). The ECJ, however, determined that it is the responsibility of the national court to assess whether the agreement has the potential to substantially impact trade between Member States (para 64).

3. CONCLUSION

The ECJ confirmed for the first time the established EU law principles to vertical price-fixing agreements (see Judgement of the Court of 14 March 2013 in Case C-32/11, Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal, para 36). In addition, the ECJ emphasizes that the finding of a restriction "by object" in vertical agreements must be carried out by considering the agreement's terms, its intended objectives, and all the elements that characterize the economic and legal context in which it is situated.

This means that an assessment according to Art 101(1) TFEU should be carried out and not according to Art. 101(3) TFEU, despite the Binon judgment (see judgment of the Court of 3 July 1985 in Case 243/83, SA Binon & CIE, vs. SA Agence et messagieries de la presse). Against this background, the agreement's restrictive nature cannot be automatically presumed. Moreover, the restriction "by object" must be demonstrated (Rosas, Neves, & Nunes. 2023, July 17. Kluwer Competition Law Blog. Unraveling the ECJ's Verdict in Case C-211/22 – Super Bock: The Golden Rules to Assess Vertical Price-Fixing Agreements in EU Competition Law).

Although deviating from stricter framework centered on the primary purpose and severe restrictions may complicate the application of the law, this ruling encourages a more thoughtful evaluation of vertical agreements and their overlap with competition law.

While the judgment emphasizes the need to consider the broader legal and economic context of the agreement rather than automatically assuming a "by object" restriction, it is yet to be determined whether the Portuguese court will assess the existence of efficiencies under Article 101(3) TFEU.

REFERENCES

Bauer / Rahlmeyer / Schöner, (2020), Vertriebskartellrecht. § 9 Preisbindungen, para 12.
Communication from the Commission. (2022). Commission Notice, Guidelines on vertical restraints (2022/C 248/01).
ECJ, Judgment of December 13, 2012, Case C-226/11, para. 37 – Expedia.
European Court of Justice (ECJ), July 15, 1970, Case C-261/70, para. 112 – ACF.
German Competition Authority. (July 2017). Guidelines on Price Fixing Prohibition in the Field of Food Retail
https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hinweispapier%20Preisbindung%20im%20Lebensmitteleinzelhandel.pdf?__blob=publicationFile&v=8
Kluwer Competition Law Blog. (July 17, 2023). Unraveling the ECJ's Verdict in Case C-211/22 – Super Bock: The Golden Rules to Assess Vertical Price-Fixing Agreements in EU Competition Law, Gonçalo Rosas, Inês F. Neves, Joana Fraga Nunes (Morais Leitão). https://competitionlawblog.kluwercompetitionlaw.com/2023/07/17/unravelling-the-ecjs-verdict-in-case-c-211-22-super-bock-the-golden-rules-to-assess-vertical-price-fixing-agreements-in-eu-competition-law/
Regulation (EU) 2022/720.
Judgment of the Court of 3 December 1987 in Case 136/86, BNIC v Aubert, para 18.
Judgment of 11 July 2013, Ziegler v Commission, C 439/11 P, EU:C:2013:513, para 93.
Judgment of the Court of 3 July 1985 in Case 243/83, SA Binon & CIE, vs. SA Agence et messagieries de la presse.
Judgement of the Court of 14 March 2013 in Case C-32/11, Allianz Hungária Biztosító Zrt and Others v Gazdasági Versenyhivatal.
Visma Enterprise. (November 18, 2021). Court of 18 November 2021 in Case C-306/20.
Jacques Buhart, Stéphane Dionnet, Frédéric Pradelles. (July 11, 2023). Vertical agreements & restriction of competition by object: What's new in Europe? https://www.mwe.com/insights/vertical-agreements-restriction-of-competition-by-object-whats-new-in-europe/